

10/03/2007



File
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Brian Schweitzer, Governor

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • www.deq.mt.gov

October 3, 2007



Tom Aldrich
Vice-President, Environmental Affairs
Asarco
8222 S. 48th Street, Suite 220
Phoenix, AZ 85044

CERTIFIED MAIL #7006 2760 0000 9025 9441
Return Receipt Requested

RE: ASARCO LLC Fully Executed Administrative Order on Consent, Docket No. HW-07-01
(FID 729)

Dear Mr. Aldrich:

Enclosed is a fully executed copy of Administrative Order on Consent (Consent Order) to resolve the hazardous waste violations that occurred at the ASARCO LLP (ASARCO) East Helena lead smelter.

If you have any questions, please contact me at (406) 444-2711.

Sincerely,

Chad W. Anderson
Environmental Enforcement Specialist
Enforcement Division
Phone: 406-444-2711, Fax: 406-444-1923
E-mail: chada@mt.gov



Encl.: Administrative Order on Consent

cc/enc: Jim Madden, DEQ Legal Unit
Ed Thamke/Mark Hall, DEQ WUTMB
John Wardell, EPA Region 8, Montana Office
Jon Nickel, ASARCO East Helena Plant, P.O. Box 1230, East Helena, MT 59635
Chuck Figur, EPA Region 8, 999 18th St., Suite 500, Denver, CO, 80202-2405

cc: Lewis and Clark County Sanitarian, 316 N Park, Helena, MT 59623

Linda J. EPA

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

IN THE MATTER OF:
VIOLATIONS OF THE MONTANA
HAZARDOUS WASTE ACT BY ASARCO
INCORPORATED, LEWIS AND CLARK
COUNTY, MONTANA (FID 729)

ADMINISTRATIVE ORDER ON
CONSENT

Docket No. HW-07-01

COPY

TO: ASARCO LLC
100 Smelter Avenue
East Helena, MT 59635

I. JURISDICTION

1. The State of Montana, by and through the Department of Environmental Quality (Department), issues this Administrative Order on Consent (Consent Order) to ASARCO LLC (ASARCO). This Order is issued pursuant to the Montana Hazardous Waste Act (Act), Title 75, chapter 10, part 4, Montana Code Annotated (MCA), and the Administrative Rules of Montana (ARM) that implement the Act. The Act authorizes the Department to regulate the storage, transportation, treatment, and disposal of hazardous waste.

2. The Department is an agency of the executive branch of state government duly created and existing under the authority of Section 2-15-3501, MCA.

3. The Department is charged with the administration and enforcement of the Act and, pursuant to Section 75-10-405, MCA, is specifically authorized to adopt rules governing the administration, implementation, and enforcement of the Act. The Department has adopted rules in ARM Title 17, chapter 53, pursuant to this authorization.

4. ASARCO LLC is a Delaware Limited Liability Company doing business in the State of Montana. ASARCO owns a lead smelter in the State of Montana.

5. The Department has alleged that ASARCO violated Title 75, chapter 10, part 4, MCA,

1 and the rules promulgated thereunder, as set forth below. Therefore, the Department has
2 jurisdiction to issue this Order.

3 II. FINDINGS OF FACT

4 The Department makes the following Findings of Fact:

5 6. ASARCO is the owner of a lead smelter in East Helena, Lewis and Clark County,
6 Montana (Facility) and generates hazardous waste.

7 7. On March 16, 2004, the Department filed a Complaint against ASARCO Incorporated
8 in the Montana First Judicial District Court, Lewis and Clark County, alleging ASARCO violated
9 the Montana Hazardous Waste Act (MHWa) and the rules adopted under its authority.
10 Specifically, the Department alleged that ASARCO Incorporated violated Section 75-10-406(1),
11 MCA, by operating a hazardous waste management facility without a permit, and 40 CFR
12 262.34(b) (incorporated by reference in ARM 17.53.601) by storing greater than 2,200 pounds of
13 hazardous waste at their Facility for more than ninety (90) days without a permit and failing to
14 gain an extension of the 90-day period.

15 8. On February 15, 2005, the Department and ASARCO Incorporated stipulated to the
16 terms of a Consent Decree, Judgment, and Order (Consent Decree), entered by the Court on
17 February 17, 2005, in which ASARCO agreed to assessment of a penalty and to perform a
18 schedule of work activities at the Facility through the end of 2006.

19 9. In March of 2005, ASARCO Incorporated changed its corporate form to ASARCO
20 LLC.

21 10. On August 9, 2005, ASARCO filed a petition for relief under chapter 11 of title 11 of
22 the United States Code (Bankruptcy Code) requesting protection of its assets and allocation of its
23 liabilities under the Bankruptcy Code.

24 11. On October 27, 1999, the US Environmental Protection Agency (EPA) granted

1 ASARCO Incorporated approval to construct a Corrective Action Management Unit (CAMU),
2 comprised of multiple cells, at the Facility. On October 23, 2006, the EPA granted ASARCO
3 approval to store certain CAMU eligible hazardous wastes in a CAMU cell at the Facility.

4 12. ASARCO has accomplished all of the activities in the previous Consent Decree work
5 plans by the December 31, 2006, deadline, except for removing and properly disposing hazardous
6 waste stored in the Subpart DD containment structures, and cleaning the thawhouse building,
7 portions of the acid plant, and the water treatment process units.

8 13. The Department and ASARCO agree to the terms of this Consent Order for ASARCO
9 to continue with the cleanup processes established under the work plan provisions of the previous
10 Consent Decree.

11 14. ASARCO disputes the Department's allegations and its assent to this Consent Order
12 shall not constitute or be construed as an admission of liability or an admission that the
13 Department's characterization of materials at the Facility as hazardous waste and/or recyclable
14 materials is correct. Nor does ASARCO assent that the use of the terms "hazardous waste" or
15 "recyclable materials" in any Work Plan constitute such an admission.

16 III. CONCLUSIONS OF LAW

17 Based upon the preceding Findings of Fact, the Department makes the following
18 Conclusions of Law:

19 15. The Department has the authority to issue this Order under Section 75-10-413, MCA,
20 to address violations of the Act and the regulations implementing the Act. In addition, under
21 Section 75-10-424(1), MCA, the Department may, in appropriate circumstances, assess an
22 administrative penalty not to exceed \$10,000 for each violation of a provision of the Act or a rule
23 adopted thereunder.

24 16. Section 75-10-406(1), MCA, states in part that "A person may not construct or operate

1 a Hazardous Waste management facility (HWMF) without first obtaining a permit from the
2 department for the facility . . ." According to Section 75-10-403(5), MCA, a HWMF is defined as
3 land that is used for treating, storing, or disposing of hazardous waste. The Department alleges
4 that ASARCO was storing hazardous waste at the East Helena smelter. Therefore, ASARCO was
5 considered by the Department to be operating a HWMF.

6 17. ASARCO does not have a permit from the Department to construct or operate a
7 HWMF under Section 75-10-406, MCA.

8 IV. ADMINISTRATIVE ORDER ON CONSENT

9 NOW, THEREFORE, THE DEPARTMENT ORDERS AND ASARCO AGREES AS
10 FOLLOWS:

11 18. ASARCO will develop and implement a yearly work plan for calendar years 2007-
12 2012 to remove, store and properly dispose or recycle all remaining hazardous waste and/or
13 secondary material located in the process units, pollution control devices, and storage units, and
14 other identified areas of the Facility. The areas are identified initially on Appendix A to the 2007
15 Work Plan attached to this Consent Order. For work plans submitted pursuant to this agreement,
16 Asarco shall clearly describe the work which constitutes above ground removal of hazardous
17 wastes during the demolition of on-site structures. Such work is subject to the terms of this
18 Consent Order. All other remaining engineered structures and ancillary equipment and all other
19 remediation waste and contamination shall continue to be addressed under the terms of Federal
20 consent decree CV-89-3-H-CCL, an agreement between the United States and Asarco.

21 19. To the extent that ASARCO disposes of hazardous waste and/or secondary materials, it
22 will do so either by removal to an approved CAMU at the Facility or by removal to another
23 authorized Facility according to the proper regulatory procedures under the MHLA and its
24 regulations thereunder.

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1 20. ASARCO and the Department will identify and prioritize in the work plan the
2 remaining process locations at the Facility requiring removal of hazardous waste and secondary
3 material, with the exception of the Blast Furnace Flue and Monier Flue up to the Distribution Fan
4 House which are to be addressed under an EPA Interim Measures Work Plan. ASARCO will
5 submit to the Department a 2007 Work Plan, describing the scheduled work for that year.
6 ASARCO will submit an updated work plan by March 15 of each year thereafter through March
7 15, 2012, or upon completion of the work required under this Consent Decree, whichever occurs
8 first. The Department will either approve or amend the site cleanup priorities each year.

9 21. ASARCO will provide to the Department quarterly progress reports by the 15th of the
10 month following the end of each quarter of the year for which a work plan is in effect. The
11 quarterly progress report shall describe the extent of work completed by ASARCO at the Facility
12 during the course of the preceding quarter.

13 22. Upon agreement by ASARCO to the terms of this Consent Order and the Work Plan,
14 and under the specific terms and time limitations of the Consent Order and the Work Plan, the
15 Department expressly waives ASARCO's storage and permitting requirements at the Facility for
16 materials classified as hazardous waste as set forth at 40 CFR 262.34(a) and 40 CFR 262.34(b)
17 over the course of the Work Plan. The Department expressly reserves all of its statutory and
18 regulatory powers, authorities, rights, and remedies, both legal and equitable, which it may apply
19 upon ASARCO's failure to comply with any applicable laws and regulations relating to matters
20 that are not addressed by the Work Plan or upon ASARCO failure to comply with the terms of the
21 Work Plan.

22 23. If an event occurs that may delay performance of any obligation under this Consent
23 Order or Work Plan, ASARCO shall notify the Department in writing within thirty (30) days after
24

1 ASARCO knows, or should know by implication of general industry standards, that the event may
2 cause a delay. The notice must include:

- 3 i. An explanation of the reasons for the delay;
- 4 ii. The expected duration of the delay; and
- 5 iii. A description of all actions taken, or to be taken, to prevent or minimize the
6 delay and a schedule for implementation of those actions.

7 The Department will review the request for extension or modification of Work Plan and
8 respond with acceptance or denial within fifteen (15) working days of receiving the request.

9 24. ASARCO agrees to pay to the Department stipulated penalties in the amount of \$1,000
10 per day for each day that ASARCO fails to meet a scheduled completion date in the approved
11 Work Plan or for each day that ASARCO allows other significant deviations not otherwise
12 specified as exempt in this Decree or the approved Work Plan from the Montana Hazardous Waste
13 Act (the "Act") (Section 75-10-401 *et seq.*) and the rules implementing the Act (ARM Title 17,
14 chapter 53). The Department retains discretion to reduce or forgive any stipulated penalties that
15 may be assessed under this Decree.

16 25. Failure to pay a stipulated penalty when due will entitle the State to a writ of execution
17 for the full amount of the stipulated penalty due, following thirty (30) days written notice to
18 ASARCO of demand for payment of stipulated penalties due.

19 26. The provisions of this Consent Order concerning stipulated penalties are designed to
20 protect public health and welfare and the environment by deterring violations of this Consent
21 Order by providing a timely remedy for corrective action and to deter future violations.

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1 27. ASARCO shall pay stipulated penalties in full by check or money order, payable to the
2 "Montana Department of Environmental Quality", and must be sent to:

3 Administrator
4 Department of Environmental Quality
5 Enforcement Division
6 P.O. Box 200901
7 Helena, MT 59620-0901

8 28. In exchange for the Order, ASARCO also agrees:

- 9 (a) Not to appeal the issuance of this Consent Order;
10 (b) Not to deduct for any tax purpose any portion of any stipulated penalties
11 ASARCO may incur;
12 (c) To submit written certification that the penalty expenditure is not deducted
13 for any tax purposes;
14 (d) Not to challenge the jurisdiction, the essential facts which establish
15 jurisdiction, or the authority of the Department to enforce this Consent
16 Order; and
17 (e) Not to contest the validity or enforceability of any provision, term, or
18 condition of this Consent Order.

19 **VIII. SUBMISSION OF REPORTS AND NOTICES**

20 29. All reports and notices that must be sent to the Department under this Consent Order
21 shall be sent to:

22 Administrator
23 Enforcement Division
24 Department of Environmental Quality
1520 E. Sixth Avenue
P.O. Box 200901
Helena, Montana 59620-0901

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1 ASARCO shall also deliver copies of reports and notices prepared under this Consent
2 Order to the following address:

3 RCRA Project Manager
4 United States Environmental Protection Agency
5 Region 8
6 1595 Wynkoop Street
7 Denver, CO 80202-1129

8 All correspondence required to be sent to ASARCO under this Consent Decree shall be
9 sent to:

10 Environmental Manager
11 ASARCO East Helena Plant
12 P.O. Box 1230
13 East Helena, MT 59635

14 30. Compliance with this Consent Order constitutes a full and final settlement of the
15 violations alleged above.

16 31. None of the requirements in this Consent Order are intended to relieve ASARCO from
17 its obligation to comply with all applicable state, federal, and local statutes, rules, ordinances,
18 orders, and permit conditions.

19 32. The Department reserves the right to take any additional enforcement action against
20 ASARCO for any failure to comply with this Consent Order or for any violation not addressed in
21 this Consent Order.

22 33. This Consent Order constitutes the entire agreement between the parties. No
23 modification of this Consent Order is binding unless in writing and signed by both parties.

24 34. Each of the signatories to this Consent Order represents that he or she is authorized to
enter into this Consent Order.

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1 35. This Consent Order becomes effective when signed by ASARCO.

2 IT IS SO ORDERED:

IT IS SO AGREED:

3 DEPARTMENT OF
4 ENVIRONMENTAL QUALITY

ASARCO LLC

5 John Amy for
6 Jenny Chambers, Acting Administrator
Enforcement Division

D. E. McAllister
Signature

7 10/2/07
8 Date

Douglas E. McAllister
Print Name

9 Executive Vice President, General Counsel
Title

10
11

08-10-07
Date

12
13

Thomas L. Aldrich
Signature

14
15

Thomas L. Aldrich
Print Name

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17

Vice President, Environmental Affairs
Title

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08-10-2007
Date

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